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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973

No. 73-837

JOHN WAYNE SHELTON,
Petitioner

-vs-

STATE OF NORTH CAROLINA,
Respondent

ON WRIT OF CERTIORARI
TO THE NORTH CAROLINA COURT OF APPEALS

ANSWER OF RESPONDENT STATE OF NORTH CAROLINA TO PETITION FOR WRIT OF CERTIORARI

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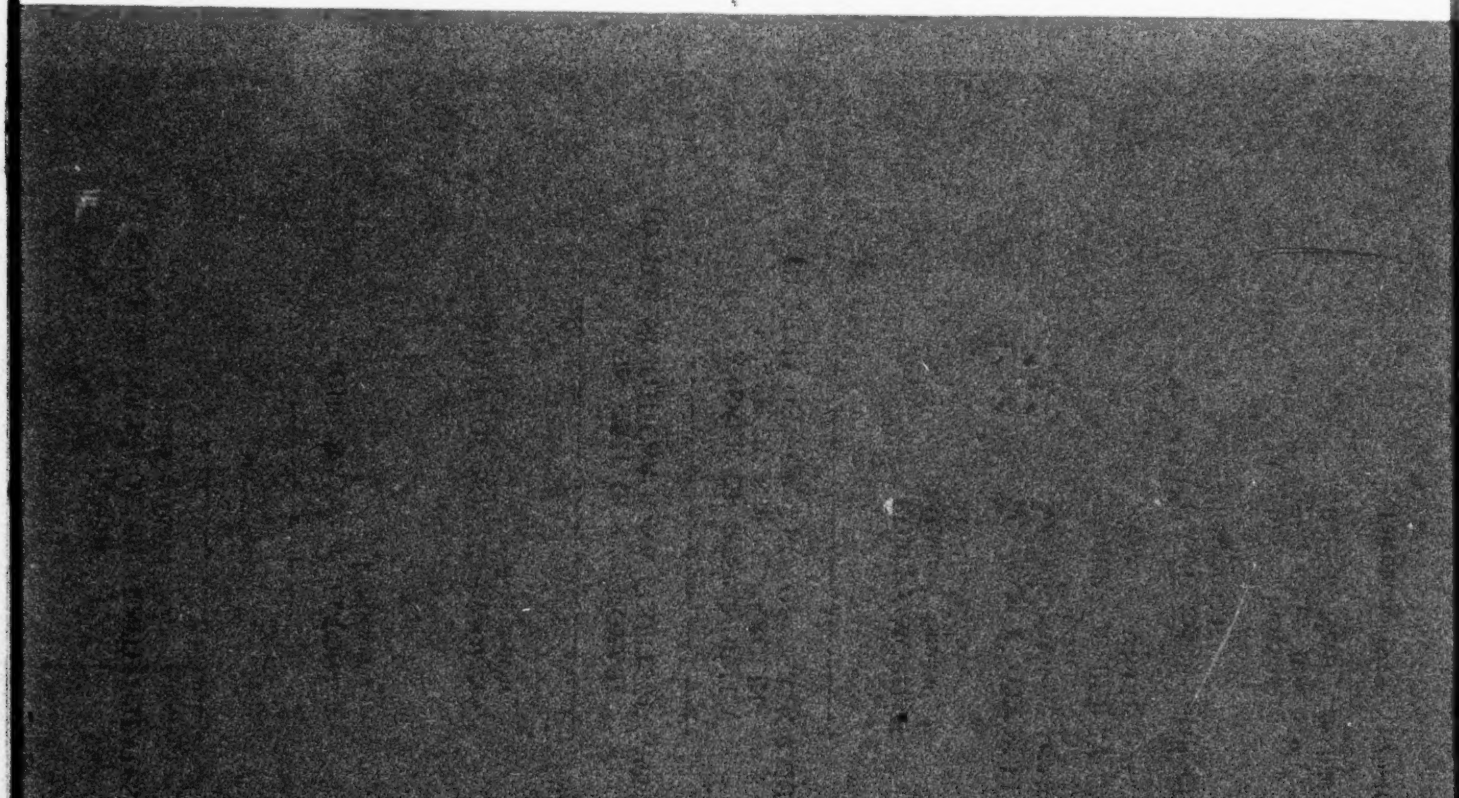

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OPINIONS BELOW

The opinion of the North Carolina Court of Appeals, 18 N. C. App. 616, 197 S. E. 2d 588 (1973) is appended to this petition. The order of the Supreme Court of North Carolina denying petitioner's petition for certiorari, 283 N. C. 758, 198 S. E. 2d 728 (1973), is also appended to this petition.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I. Whether the peitioner was denied due process of law under the Fourteenth Amendment to the United States Constitution when the sentencing judge, during the sentencing proceedings, relied on unsworn, out-of-court hearsay statements which were materially false?

II. Whether the petitioner's rights under the Fourth and Fourteenth Amendments to the Constitution of the United States were abridged when certain evidence seized in a search of the petitioner's vehicle was allowed into evidence over the petitioner's objection?

III. Whether the petitioner was denied due process of law under the Fourteenth Amendment to the United States Constitution when a State's witness was allowed to make immaterial and highly prejudicial statements based on hearsay stating that he had been placed in protective custody because somebody had put a "contract" out on him?

IV. Whether the petitioner was denied due process of law under the Fourteenth Amendment to the United States Constitution when the conviction was based on the uncorroborated and uncertain testimony of that alleged accomplice?

V. Whether the petitioner was denied due process of law under the Fourteenth Amendment to the United States Constitution when the State's attorney was allowed to ask over the objections of petitioner's attorney whether the petitioner had been involved in a number of break-ins and robberies, none of which had resulted in his conviction?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT IV.

The right of the people to be secure in their persons, houses, papers, and effects, against

unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

AMENDMENT XIV.

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

North Carolina General Statutes:

§ 14-55. *Preparation to commit burglary or other housebreakings.*–If any person shall be found armed with any dangerous or offensive weapon, with the intent to break or enter a dwelling, or other building whatsoever, and to commit any felony or larceny therein; or shall be found having in his possession, without lawful excuse, any picklock, key, bit, or other implement of housebreaking; or shall be found in any such building, with intent to commit any felony or larceny therein, such person shall be guilty of a felony and punished by fine or imprisonment in the State's prison, or both, in the discretion of the court.

§14-89.1. *Safecracking and safe robbery.*– Any person who shall, by the use of explosives, drills, or tools, unlawfully force open or attempt to force open or "pick" the combination of a safe or vault used for storing money or other valuables, shall, upon conviction thereof, receive a sentence, in the discretion of the trial judge, of not less than two years nor more than 30 years' imprisonment in the State penitentiary.

STATEMENT OF THE CASE

The petitioner was convicted on October 16, 1972, in the Forsyth County Superior Court of attempted safecracking in violation of N.C.G.S. 14-89.1 and was sentenced to a term of imprisonment of not less than fifteen nor more than twenty-five years. The petitioner appealed to the North Carolina Court of Appeals which affirmed the conviction in an opinion dated 11 July 1973. The petitioner filed a Petition for Writ of Certiorari to the North Carolina Court of Appeals which was denied in an order dated 3 September 1973.

ARGUMENT

I. THE SENTENCING PROCEEDINGS AFFORDED THE DEFENDANT DUE PROCESS OF LAW.

The petitioner's argument rests upon the following statement of the trial court during the sentencing proceedings:

> "My information about young man is – and I have been knowing of him a year or two myself – is that he decided here some time ago – is that he decided he was going to be a professional housebreaker and thief. Now, I'll – and I'm wondering – see, I know about him through some people that I represent and he was involved then. How many charges does he have against him now? ... And I mean this – I'm just telling it as I see it – and of course that he decided that he was going to be a professional and I understand his mother is – his family is good people. This happens to the very – children of the very best families. I don't blame them for this. And I think actually I would be doing them a great favor –." (Record at 104 and 105)

The petitioner asserts that this statement of the trial court contains false statements of fact which the petitioner was not allowed to controvert because the petitioner was not informed of the identity of and was not able to cross-examine his accuser. The lack of opportunity to cross-examine his accuser and impeach his credibility, the petitioner contends, is a denial of due process of

law. In support of his position, the petitioner cites *Townsend v. Burke*, 334 U. S. 736, 68 S. Ct. 1252, 92 L. Ed. 1690 (1948), and attempts to distinguish *Williams v. New York*, 337 U. S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949), and *Williams v. Oklahoma*, 358 U. S. 576, 79 S. Ct. 421, 3 L. Ed. 2d 516 (1959).

In *Townsend v. Burke, supra*, the defendant was not represented by counsel. The trial court, before sentencing the defendant, recited a list of charges – one of which had been dismissed and from two of which the defendant had been acquitted. This Court noted that "Counsel, had any been present, would have been under a duty to prevent the court from proceeding on such false assumptions and perhaps under a duty to seek remedy elsewhere if they persisted." (at 740) This Court continued: "It is the careless or designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide, that renders the proceedings lacking in due process." (at 741)

In the present case, the defendant was represented by counsel. The record shows at 104 that the defendant presented several character witnesses in his own behalf. Presumably, these witnesses testified as to the petitioner's good character and provided the trial court a perspective from which to impose sentence. The statement of the trial court informed the petitioner of the court's disposition to the petitioner and enabled the petitioner to correct any impressions which the court had acquired.

The respondent believes that the trial court provided the petitioner sufficient opportunity to respond to the court's stated impressions as to his character and to produce testimony and evidence of his good character. In so doing, the trial court followed the directive of the North Carolina Supreme Court as stated in *State v. Pope*, 257 N. C. 326, 126 S. E. 2d 126 (1962):

> "The accused has the undeniable right to be personally present when sentence is imposed. Oral testimony, as such, relating to punishment is not to be heard in his absence. He shall be given full opportunity to rebut defamatory and condemnatory matters urged against him, and to give his version of the offense charged, and to introduce any relevant facts in mitigation." (at 334)

The petitioner contends that only the right to cross-examine his detractors can assure him of due process in a sentencing proceeding. However, the petitioner fails to note that the trial court only professed knowledge of the petitioner's character and reputation. The petitioner submitted his own character witnesses in rebuttal. There was no false fact, indeed no fact, which cross-examination of any witness could cast into disrepute. This present case is simply not analogous to *Townsend v. Burke, supra,* wherein skill of counsel could have exposed the falsity of a material fact in sentencing.

The respondent contends that this Court has clearly held in *Williams v. Oklahoma, supra,* that the right of cross-examination is not required at a sentencing proceeding:

> "But we go on to consider this Court's opinion in *Williams v. New York*, 337 U. S. 241. This Court dealt there with very similar contentions and held that, once the guilt of the accused has been properly established, the sentencing judge, in determining the kind and extent of the punishment to be imposed, is not restricted to evidence derived from the examination and cross-examination of witnesses in open court but may, consistently with the Due Process Clause of the Fourteenth Amendment, consider responsible unsworn or 'out-of-court' information relative to the circumstances of the crime and to the convicted person's life and characteristics." (at 584)

Therefore, the respondent concludes that, even if there was a fact capable of impeachment upon cross-examination, the petitioner was not denied any existing constitutional right of cross-examination but instead was afforded full opportunity, consistent with due process, to present favorable character witnesses to rebut any unfavorable impressions the court might have received concerning the petitioner.

II. THE SEARCH OF DEFENDANT'S AUTOMOBILE AND THE ADMISSION OF EVIDENCE FOUND THEREIN WERE REASONABLE UNDER THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The facts relevant to petitioner's second argument were set out by the trial court upon conclusion of the *voir dire* examination.

> "Sitting in front of 1309 South Hawthorne Road, approximately twenty-five feet from the door, was a 1968 Plymouth Fury automobile, black over green, license number BY-44931. This was the only automobile parked in this block. The officer felt the hood of this car and it was warm. Standing on the outside looking in, the officers could see inside the car and observed the ignition key in the switch, loose change in the floor, contraceptives, a crowbar or pry bar approximately fourteen inches long, and a screwdriver approximately eighteen inches long.
>
> "It was determined from information in the area that there had been two subjects in Builder's Harbor, Incorporated, and bloodhounds were called. The license number of the motor vehicle was checked and it was registered in the name of John Wayne Shelton, the defendant in this case. John Wayne Shelton was known to the officers who knew he was a friend and companion of Eddie Spivey, the man caught running from the place of business.
>
> "It was further learned that John Wayne Shelton and Eddie Spivey had been seen earlier in the evening at a taproom across the street.
>
> "With this information, the officers searched the 1968 Plymouth ..." (Record at 33 and 34)

The respondent believes that the warrantless seizure and subsequent search of the automobile were reasonable under the Fourth Amendment of the United States Constitution. The warrantless seizure and search were justified under the "plain view" theory and the "exigent circumstances" theory applicable to automobiles.

In *Coolidge v. New Hampshire*, 403 U. S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), this Court recognized that "the distinction between an 'instrumentality of crime' and 'mere evidence'

was done away with by *Warden v. Hayden*, 387 U. S. 294." (at 464) Therefore, when the officer peered through the window of the car and saw an eighteen-inch screwdriver and a fourteen-inch pry bar on the floor-board, the officer, provided that probable cause and exigent circumstances existed, was justified in seizing the screwdriver and pry bar either as implements of housebreaking, possession of which is a felony under N.C.G.S. 14-55, or as evidence related to the recently committed crime. This Court stated in *Coolidge v. New Hampshire, supra*, that the "plain view" theory was only applicable where there was no prior unconstitutional intrusion. In the present case, there was no intrusion whatsoever. The automobile was parked on a city street and the officer by merely looking through the window could see the objects in question. The "plain view" theory requires that the officer have probable cause to seize the objects. Although the objects seized do have lawful uses, it is common knowledge that an eighteen-inch screwdriver and a fourteen-inch pry bar are implements of housebreaking. The respondent argues that this common knowledge is more than a "strong reason to suspect" and is, in fact, probable cause that the objects were within the scope of N.C.G.S. 14-55 and were evidence, if not instruments, of the recently committed crime when the circumstances of the discovery, as previously set out, are considered. Finally, this Court stated in *Coolidge v. New Hampshire, supra*, that objects discovered in plain view could only be seized if exigent circumstances so required. In the present case, the objects were discovered on the floorboard of an automobile parked on a city street. All the facts known to the officer required the conclusion that the automobile had been used by the persons who attempted to open the safe in Builder's Harbor, Incorporated. Two persons had been seen running from the area when the police arrived; only one person was apprehended by the police. It was most probable that if the automobile was left unattended, the uncaptured participant would return and drive off the automobile. Given probable cause, the exigent circumstances rendered unnecessary the obtaining of a warrant from a magistrate. See *Chambers v. Maroney*, 399 U. S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1969).

This Court has described the "exigent circumstances" theory applicable to automobiles in *Chambers v. Maroney, supra*, at 51:

> "Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient

> authorization for a search...*Carroll, supra*, holds a search warrant unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Hence an immediate search is constitutionally permissible."

Although in the present case the automobile was not stopped on the highway and there were no occupants, the car was parked on a city street and the uncaptured participant in the crime was alerted to the presence of the police. The mobility of the car and the probability that the contents of the automobile would never be found again are present in both cases. The same circumstances, previously discussed, give rise to the existence of probable cause and exigent circumstances which are also necessary for the applicability of this theory.

Therefore, the seizure and search of the automobile were reasonable under the Fourth Amendment to the United States Constitution and the objects found on the floorboard and in the glove compartment of the automobile were properly admitted into evidence.

III. THE ADMISSION OF A STATEMENT BY THE ALLEGED ACCOMPLICE DID NOT VIOLATE THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW.

The alleged accomplice of the petitioner, Eddie Ray Spivey, testified for the State. Upon cross-examination, the petitioner's attorney persistenly and repeatedly inquired into the reasons why Eddie Ray Spivey was testifying for the State. (Record at 54 through 59) The petitioner's attorney asked repeatedly whether Eddie Ray Spivey had spent any time in jail and, if so, how long. To one of the questions the alleged accomplice replied: "They put me in protective custody." (Record at 59) Upon redirect examination, Eddie Ray Spivey was asked why he was put in protective custody. He replied: "Somebody had a contract out on me." (Record at 59) He was asked: "What is a contract?" and he replied: "Somebody paid somebody to kill me." (Record at 59)

The petitioner's attorney attempted through cross-examination to impeach the credibility of the alleged

accomplice. The attorney demonstrated to the jury that Eddie Ray Spivey had spent little time in jail since the commission of the alleged crime. The State's attorney, on the other hand, attempted to establish why the alleged accomplice had been in protective custody and to strengthen the credibility of his witness.

The questions and answers on redirect were material and relevant for the two aforementioned purposes. The two answers of Eddie Ray Spivey were not hearsay. Although the questions and answers may have created some prejudice indirectly against the petitioner, the questions and answers should not have been excluded solely because of that fact. The North Carolina Supreme Court has stated the rule in *State v. Green*, 251 N. C. 40, 110 S. E. 2d 609 (1959); "If the only effect of evidence is to excite prejudice or sympathy, its admission may be ground for a new trial. But relevant evidence will not be excluded simply because it may tend to prejudice the opponent or excite sympathy for the cause of the party who offers it." (at 45)

The respondent contends that the answers of the witness were properly admitted into evidence.

IV. PETITIONER'S CONVICTION, GROUNDED PRIMARILY ON THE TESTIMONY OF HIS ALLEGED ACCOMPLICE, WAS NOT A DENIAL OF DUE PROCESS OF LAW.

The North Carolina Supreme Court has explained the applicable law in *State v. McNair*, 272 N. C. 130, 157 S. E. 2d 660 (1967): "It is well settled in this jurisdiction that although the jury should receive and act upon such testimony with caution, the unsupported testimony of an accomplice is sufficient to sustain a conviction if it satisfies the jury beyond a reasonable doubt of the guilt of the accused." (at 132)

The trial court properly instructed the jury as to the credibility to be given to the testimony of a witness. (Record at 84 and 85) The trial court also instructed as to the definition of "accomplice" and to the weight to be given the testimony of an accomplice. (Record at 102)

Mr. Justice Harlan stated in *Edwards v. New York*, 76 S. Ct. 1058, 1 L. Ed. 2d 17 (1956), that "The credibility of the accomplice was for the jury, and the record discloses nothing on this score which even approaches the level of a tenable claim of denial of due process." (at 1062) The respondent submits that this is dispositive of petitioner's fourth argument.

V. CROSS-EXAMINATION OF PETITIONER AS TO PRIOR OFFENSES DID NOT CONSTITUTE A DENIAL OF DUE PROCESS OF LAW.

The North Carolina Supreme Court has stated the applicable law in *State v. Foster*, 284 N. C. 259, ____ S. E. 2d ____ (12 December 1973):

> "When a defendant elects to testify in his own behalf, he surrenders his privilege against self-incrimination and knows he will be subject to impeachment by questions relating to specific acts of criminal and degrading conduct. Such 'cross-examination for the purpose of impeachment *is not limited to conviction of crimes.* Any act of the witness which tends to impeach his character may be inquired about or proven by cross-examination.' (Citations omitted) Defendant concedes the rule to be as stated but requests the Court to re-examine and repudiate it. The rule is necessary to enable the State to sift the witness and impeach, if it can, the credibility of a defendant's self-serving testimony. We therefore adhere to our prior decisions." (at 275)

This Court affirmed the validity of this practice in *McGautha v. California*, 402 U. S. 183, 91 S. Ct. 1454, 28 L. Ed. 2d 711 (1970): "It is also generally recognized that a defendant who takes the stand in his own behalf may be impeached by the proof of prior convictions or the like." (at 215)

The respondent contends that the law is settled on this point and that the petitioner's argument is without merit.

Mr. Justice Harlan stated in Edwards v. New York, 76 S. Ct. 1058, 1 L. Ed. 2d 17 (1956), that "The credibility of the accomplice was for the jury, and the record discloses nothing on the score which even approaches the level of a tenable claim of denial of due process." (at 1062) The respondent submits that this is dispositive of petitioner's fourth argument.

V. CROSS-EXAMINATION OF PETITIONER AS TO PRIOR OFFENSES DID NOT CONSTITUTE A DENIAL OF DUE PROCESS OF LAW.

The North Carolina Supreme Court has stated the applicable law in State v. Foster, 284 N. C. 159, ___ S. E. 2d ___ (12 December 1973):

> "When a defendant elects to testify in his own behalf, he surrenders his privilege against self-incrimination and knows he will be subject to impeachment by questions relating to specific acts of criminal and degrading conduct. Such 'cross-examination for the purpose of impeachment is not limited to conviction of crimes. Any act of the witness which tends to impeach his character may be inquired about or proven by cross-examination.' (Citations omitted) Defendant concedes the rule to be as stated but requests the Court to re-examine and repudiate it. The rule is necessary to enable the State to sift the witness and impeach, if it can, the credibility of a defendant self-serving testimony. We therefore adhere to our prior decisions." (at 275)

The Court affirmed the validity of the practice in McGautha v. California, 402 U. S. 183, 91 S. Ct. 1454, 28 L. Ed. 2d 711 (1970): "It is also generally recognized that a defendant who takes the stand in his own behalf may be impeached by the proof of prior convictions or the like." (at 215)

The respondent contends that the law is settled on this point and that the petitioner's argument is without merit.

CONCLUSION

For the reasons stated above, the respondent respectfully prays that this Court deny the petition.

This the 19th day of February, 1974.

Respectfully submitted,

ROBERT MORGAN
Attorney General of North Carolina

WILLIAM F. O'CONNELL
Assistant Attorney General

ROBERT R. REILLY
Associate Attorney

Counsel for the State of North Carolina
Respondent

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Post Office Box 629
Raleigh, North Carolina 27602

Telephone (919) 829-4618

CONCLUSION

For the reasons stated above, the respondent respectfully prays that this Court deny the petition.

This the 12th day of February, 1974.

Respectfully submitted,

ROBERT MORGAN
Attorney General of North Carolina

WILLIAM F. O'CONNELL
Assistant Attorney General

ROBERT B. ROSLEY
Associate Attorney

Counsel for the State of North Carolina
Respondent

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Raleigh, North Carolina 27602

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PROOF OF SERVICE

I hereby certify that I served three copies of the foregoing Answer to Petition for a Writ of Certiorari to the North Carolina Court of Appeals on Norman B. Smith, Smith, Carrington, Patterson, Follin & Curtis, 816 Southeastern Building, Greensboro, North Carolina 27401 (which is less than 500 miles from the undersigned) by depositing the same in the U. S. mail, first class postage prepaid, this the 19th day of February, 1974.

All parties required to be served have been served.

William F. O'Connell

PROOF OF SERVICE

I hereby certify that I served three copies of the foregoing Answer to Petition for a Writ of Certiorari to the North Carolina Court of Appeals on Norman B. Smith, Carrington, Patterson, Follin & Curtis, 816 Southeastern Building, Greensboro, North Carolina 27401 (which is less than 500 miles from the undersigned) by depositing the same in the U. S. mail, first class postage prepaid, this the 14th day of February, 1974.

All parties required to be served have been served.

William F. O'Connell

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973

No. 73-837

JOHN WAYNE SHELTON,
Petitioner

-vs-

STATE OF NORTH CAROLINA,
Respondent

ON WRIT OF CERTIORARI
TO THE NORTH CAROLINA COURT OF APPEALS

ANSWER OF RESPONDENT
STATE OF NORTH CAROLINA
TO PETITION FOR WRIT OF CERTIORARI

PETITION TO BE APPOINTED COUNSEL PRO HAC VICE

Robert R. Reilly, Associate Attorney, North Carolina Department of Justice, hereby petitions the Court to be appointed counsel for the Respondent *pro hac vice* in the event that certiorari is granted herein.

In support of this petition, Robert R. Reilly says that he is presently ineligible to be a member of the Bar of the Supreme Court of the United States for the reason that he has not been a practicing attorney or counselor in the highest court of a State, Territory,

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973

No. 73-827

JOHN WAYNE SHELTON,
Petitioner

-vs-

STATE OF NORTH CAROLINA,
Respondent

ON WRIT OF CERTIORARI
TO THE NORTH CAROLINA COURT OF APPEALS

ANSWER OF RESPONDENT
STATE OF NORTH CAROLINA
TO PETITION FOR WRIT OF CERTIORARI

PETITION TO BE APPOINTED COUNSEL PRO HAC VICE

Robert R. Reilly, Associate Attorney, North Carolina Department of Justice, hereby petitions the Court to be appointed counsel for the Respondent pro hac vice in the event that certiorari is granted herein.

In support of this petition, Robert R. Reilly says that he is presently ineligible to be a member of the Bar of the Supreme Court of the United States for the reason that he has not been a practicing attorney or counselor in the highest court of a State, Territory,

District, Commonwealth, or Possession for three years past, having first been admitted to the North Carolina State Bar in August, 1972; that the counsel of record for the Respondent before the North Carolina Court of Appeals, Robert S. Weathers, resigned as Assistant Attorney General, North Carolina Department of Justice, on July 20, 1973; that since said counsel's resignation your petitioner has had primary responsibility for and intimate acquaintance with this action.

This the 19th day of February, 1974.

Robert R. Reilly

District, Commonwealth, or Possession for three years past, having first been admitted to the North Carolina State Bar in August, 1972, that the counsel of record for the Respondent before the North Carolina Court of Appeals, Robert S. Weathers, resigned as Assistant Attorney General, North Carolina Department of Justice, on July 20, 1973; that since said counsel's resignation your petitioner has had primary responsibility for and intimate acquaintance with this action.

This the 6th day of February, 1974.

Robert R. Reilly

PROOF OF SERVICE

I hereby certify that I served one copy of the foregoing Petition to be Appointed Counsel *Pro Hac Vice* on Norman B. Smith, Smith, Carrington, Patterson, Follin & Curtis, 816 Southeastern Building, Greensboro, North Carolina 27401 (which is less than 500 miles from the undersigned) by depositing the same in the U.S. mail, first class postage prepaid, this the 19th day of February, 1974.

All parties required to be served have been served.

Robert R Reilly

Robert R. Reilly

PROOF OF SERVICE

I hereby certify that I served one copy of the foregoing Petition to be Appointed Counsel Pro Hac Vice on Norman B. Smith, Smith, Carrington, Patterson, Follin & Curtis, 816 Southeastern Building, Greensboro, North Carolina 27401 (which is less than 500 miles from the undersigned) by depositing the same in the U.S. mail, first class postage prepaid, this the 19th day of February, 1974.

All parties required to be served have been served.

Robert R. Reilly

APPENDIX TO PETITION

No. 7321SC 313 TWENTY-FIRST DISTRICT

NORTH CAROLINA COURT OF APPEALS

Spring Session 1973

STATE OF NORTH CAROLINA

v. From Forsyth

JOHN WAYNE SHELTON

Appeal by defendant from Wood, Judge, 16 October 1972 Session of Superior Court, Forsyth County.

Defendant was charged in a bill of indictment with attempted safecracking and entered a plea of not guilty. At trial the State introduced evidence which tended to show the following:

On 28 September 1971 at approximately 1:30 a.m., officers of the Winston-Salem Police Department arrived on the premises of Builder's Harbor, Inc., in response to a call that there was a breaking and entering in progress. As they arrived, the officers observed a white male running in front of the building. The officers gave chase and caught the subject who was later identified as Eddie Ray Spivey. After placing Spivey under arrest the officers entered the building. The front door had been pried open and a safe combination dial, a broken safe hinge, a hammer and a screwdriver were found in an inner office area. Scratch marks were observed on the floor leading to the rear of the building where the officers found a large black safe. A loaded 32-caliber revolver, a flashlight, a hatchet and a tire tool were found near the safe. The hinges were off the safe as well as the handle which opened the safe door, and the owner of Builder's Harbor, Emory Crawford, testified that there were marks on the safe that hadn't been there the evening before when he closed for business. With exception of the gun and flashlight, the tools found scattered about the premises were taken from the inventory of Builder's Harbor.

APPENDIX TO PETITION

The officers then proceeded through the building and out the front door where they found a 1968 Plymouth automobile parked in front of the building. Later it was determined that the automobile was registered in the name of the defendant, John Wayne Shelton. The key was in the ignition switch and the hood was still warm. A screwdriver and pry-bar could be seen on the floorboard inside the car. Officers then opened the car and searched inside. A wallet was found in the dash with identification showing that defendant was the owner.

Since another suspect had been seen running from the premises a bloodhound was called to the scene in an attempt to pick up the subject's trail. The bloodhound led officers to a service station where one of the attendants told officers that he had given a ride to two strangers who were later determined to be AWOL servicement and not in any way connected with the break-in at Builder's Harbor. Meanwhile Officer S. L. Harmon checked the Builder's Harbor for fingerprints and one print of defendant Shelton was detected on the butt of the flashlight found near the safe.

Eddie Ray Spivey took the stand and testified that in the early evening hours of 27 September 1971, he and defendant were drinking beer and shooting pool at the Ardmore Taproom. They left the taproom and went to a chicken place called the Wishbone where they broke in and took some money and a gun. They then proceeded to Builder's Harbor, broke open the front door and attempted to open the safe they found in one of the inner offices. They knocked the combination dial off the safe and attempted to take the safe door off its hinges. Being unsuccessful they dragged the safe to the rear of the building and were trying to open it when police officers arrived at the scene. Both men ran from the building, and defendant was not caught by the officers.

The gun found at Builder's Harbor was identified by the owner of the Wishbone as being the one missing from his premises after the break-in on 27 September.

The State rested and in brief summary the following evidence was presented by defendant:

On the evening of 27 September 1971 defendant and Eddie Ray Spivey were drinking beer at the Ardmore Taproom and at

about 8:30 defendant left with Doris Miller. Since defendant felt he had had too much to drink he asked Doris to drive her own car and gave the ignition key to his own vehicle to Spivey. Defendant and Doris went to another night spot and then went to Spivey's trailer near Stanleyville at approximately midnight. Defendant testified that no one was at home and that he and Doris watched the late show on T.V. before retiring for the night. The next morning defendant heard on the news that Spivey had been apprehended and then called the police to report that his automobile was missing. Defendant also offered testimony that tended to show the presence of the two AWOL servicemen in the area of Builder's Harbor on the night in question.

On State's rebuttal, Cathy Spivey, wife of Eddie Ray Spivey, testified that on 27 September 1971 before she and Eddie were married, she was living at Eddie's traier. Vicky McBride and Doris Miller stopped in that evening for approximately 15 minutes and they were the only visitors she had all night. She also testified there was no T.V. in the trailer. The next morning defendant Shelton called and informed her that Eddie had been apprehended by the police at Builder's Harbor and that he had been with Eddie but had eluded the officers.

The case was submitted to the jury who found defendant guilty. Judgment was entered imposing an active sentence of not less than 15 nor more than 25 years from which defendant appealed.

Attorney General Morgan, by Assistant Attorney General Weathers, for the State.

H. Glenn Pettyjohn for defendant appellant.

MORRIS, Judge. Defendant brings forward 17 assignments of error in his brief. However, he has not set forth any properly numbered exceptions upon which those assignments of error are based as required by Rule 28, Rules of Practice in the Court of Appeals of North Carolina, and those exceptions "will be taken as abandoned by him." Nevertheless, in order to determine that justice is done, we have carefully reviewed the record on appeal with respect to all assignments of error brought forward in defendant's brief.

Defendant's first assignment of error is directed to the action

of the trial court in allowing into evidence, for the purpose of illustration, photographs of the premises of Builder's Harbor following the break-in. His contention that the State did not properly authenticate the photographs prior to their introduction is not supported by the record. Prior to the introduction of the photographs, Emory Crawford, owner of Builder's Harbor, described the premises immediately following the break-in as to the location of the safe, layout of the building, markings on the floor and the various items found scattered around the building. When handed the photographs depicting various scenes of the premises and asked if he could identify them, Crawford in each instance did so.

The accuracy of a photograph as a true representation of the scene, object or person it purports to portray may be established by any witness who is familiar with such scene, object or person, or who is competent to speak from personal observation. *State v. Gardner*, 228 N. C. 567, 46 S. E. 2d 824 (1948). The photographs were properly admitted into evidence for the purpose of illustrating Crawford's testimony, and this assignment of error is overruled.

Next we examine defendant's contention that the trial court erred in failing to charge the jury that there must be evidence to corroborate the accomplice's (Spivey's) testimony that connects defendant with the crime.

> "In some jurisdictions an *accomplice* must be corroborated, but in North Carolina the unsupported testimony of an accomplice is sufficient to convict if it satisfies the jury beyond a reasonable doubt. However, it is proper to instruct the jury to be cautious in convicting on such testimony, and refusal to give an appropriate instruction when requested is prejudicial error." I Stansbury's North Carolina Evidence, Brandis Rev., §21, pp. 52-53, and cases cited therein.

The trial court did instruct the jury to be cautious in examining Spivey's testimony. Additionally, in this case the evidence of the accomplice was supported by other evidence. This assignment of error is also without merit.

Defendant also contends that the trial court erred in

permitting the State to cross examine defendant about the commission of other crimes of which there was no evidence. Most of the questions dealt with whether the defendant had committed prior break-ins with Eddie Ray Spivey and to each question defendant answered in the negative.

> "It is permissible, for purposes of impeachment, to cross-examine a witness, including the defendant in a criminal case, by asking disparaging questions concerning collateral matters relating to his criminal and degrading conduct. (Citations omitted.) Such questions relate to matters *within the knowledge of the witness*, not to accusations of any kind made by others. We do not undertake here to mark the limits of such cross-examination except to say generally (1) the scope thereof is subject to the discretion of the trial judge, and (2) the questions must be asked in good faith." *State v. Williams*, 279 N. C. 663, 675, 185 S. E. 2d 174 (1971).

Nothing appears in the record that would indicate any abuse of discretion by the trial court or lack of good faith on the part of the State, and defendant's argument is without substance.

Finally, we examine defendant's contention that the trial court improperly denied his motion for continuance. When the motion was made at the beginning of the trial, the basis therefor now relied upon was not stated. It was only after the verdict was in and judgment entered thereon that defendant suggested that he was not notified by the solicitor which of the several cases against defendant calendared for that session would be tried. Nor has defendant shown any prejudice. Absent an abuse of discretion, a motion for continuance is ordinarily addressed to the sound discretion of the trial court and its ruling thereon is not subject to review on appeal. *State v. Blackmon*, 280 N. C. 42, 185 S. E. 2d 123 (1971). No abuse of discretion has been shown. This assignment of error is overruled.

All of defendant's other assignments of error have been carefully examined. No prejudicial error has been made to appear.

No error.

Judges BROCK and PARKER concur.

Filed July 13, 1973

No. 148PC TWENTY-FIRST DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Session 1973

STATE OF NORTH CAROLINA)
)
v.) From Forsyth
)
JOHN WAYNE SHELTON)

Petition for writ of certiorari by defendant to review the decision of the North Carolina Court of Appeals, 18 N. C. App. 616, 197 S. E. 2d 588. Denied.